

BEFORE THE PUBLIC DISCLOSURE COMMISSION

FOR THE STATE OF WASHINGTON

IN THE MATTER OF ENFORCEMENT
ACTION AGAINST

Don Bivins, Fire Chief,
Vancouver Fire Department,

Marilyn Westlake,
Education Outreach Coordinator,
Vancouver Fire Department,

Marty James, Administrator,
Clark County Fire District 5,

Respondents.

PDC CASE NO. 02-286

HEARING BRIEF OF RESPONDENTS
BIVINS AND WESTLAKE

I. PREFACE: REGARDING ORGANIZATION OF BRIEF

This brief is filed in behalf of Respondents Marilyn Westlake and Don Bivins by City of Vancouver Chief Assistant City Attorney Judith Zeider, who represents them in relation to certain allegations, and by the undersigned, private attorney, Brian H. Wolfe, who represents them individually in relation to different allegations against them in the above matter.

Stated succinctly, the undersigned Chief Assistant City Attorney Judith Zeider represents Ms. Westlake and Mr. Bivins on allegations which appear to involve activities within the scope of their employment as employees of the City of Vancouver, and the undersigned Brian Wolfe represents them for allegations which appear to be outside the scope of their employment.

Ms. Zeider will address the following allegations contained in Section IV of the Notice of Administrative Charges:

Mr. Bivins: Allegations Nos. 1, 2, and 8.

Ms. Westlake: Allegations Nos. 3-7

1 Mr. Wolfe will address the following allegations contained in Section IV of the Notice of
2 Administrative Charges:

3 Mr. Bivins – Allegations. 3-7

4 Ms. Westlake Allegation No. 2.

5 This brief is combined for the convenience of the Commission.

6 **II. BACKGROUND - SUMMARY OF CITY BUSINESS PLANNING PROCESS**

7 Pat McDonnell became the Vancouver City Manager in September of 2000. He had
8 previously been the Administrator for Clark County and had instituted a business planning
9 process for the County.

10 One of the first things Pat McDonnell did as a new city manager was to take a “financial
11 picture” of the City at the time the City was adopting its 2001-2002 biennial budget in 2000. This
12 financial picture demonstrated to McDonnell that the City’s budget was on a collision course,
13 given projected expenditures and revenues, with the growing population and demands for city
14 services.

15
16 Business planning, in his view, is a dynamic process, not an end product. It is integral to
17 changing the City’s budget process to its service delivery standards. Its purpose is to lay out the
18 groundwork for the whole array of services the City provides, generate a dialogue with Council,
19 stakeholders (i.e. the people who actually use the services) and the departments that deliver the
20 services, provide a tool for the Council and City Manager to determine what levels of service are
21 acceptable or not, and provide the departments with a working plan for conducting business.

22 On January 24, 2001, McDonnell, directed all city departments to develop a Business
23 Plan. The Parks, Police and Fire Departments were instructed to complete their respective
24 Business Plan in 2001, although McDonnell was more interested in their developing a good plan
25 rather than with meeting a specific timeline.

1 The VFD had identified service levels in 1997 in an internal Comprehensive Plan that
2 was required by the Consolidation Agreement with District 5 executed in 1994. The 2001 VFD
3 Business Planning effort built on the 1997 Comprehensive Plan and focused the Department's
4 work objectives.

5 Overall, the VFD Business Plan involved a concerted effort by the VFD to quantify
6 information about its own existing business operations, to get public and Vancouver City
7 Council input on VFD services, and to gain community understanding of and feedback about its
8 mission and programs. The VFD Business Plan studied the kinds of programs and services being
9 provided, and the impact of population growth on program services and whether VFD should
10 even perform certain services, including EMS.

12 Based on the service levels identified in its Business Plan, the VFD ultimately
13 recommended solutions to service level deficiencies including 1) purchase and staff three light-
14 duty rescue vehicles (Adaptive Response Units or ARU's) with a two paramedic staff; 2) build
15 and staff two new fire stations.

16 June 24, 2001, at a City Council Retreat on Business Planning, Council and management
17 level staff went through a hypothetical City balanced budget exercise and set expectations for
18 Council's next retreat. Among the alternatives in the balanced budget exercise were cutting \$6.8
19 million from general fund programs, including police and fire and/or increasing revenues
20 through sales tax, Real Estate Excise Tax (REET) for capital projects, imposition of Fire Impact
21 Fees (FIF), utility taxes, and reimplementing of the B&O tax. Among the expectations for the
22 next Council retreat were that the Council would fully understand the VFD business plan,
23 explore a FIF and explore an EMS levy.
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1 At the next Council retreat August 27, 2001, VFD Chief Don Bivins lead Council
2 through the Fire Business Plan 3 – ring binder and Council discussed the draft plan. Among the
3 results of that discussion were that Council agree with the VFD’s assumptions and guidance for
4 the business plan, agreed the option that provided the highest level of service was the 24 hour
5 Adaptive Response Unit (ARU)(light-duty vehicle), that Council *generally agreed* that an EMS
6 levy would address long-term structural needs related to response times, staffing levels and
7 quality of service, but indicated that additional issues needed to be addressed before finalizing
8 the plan. These issues included quantifying both ends of the EMS spectrum: doing away with it
9 completely and going into the transport business. Council also directed staff to explore the FIF
10 option.
11

12 The VFD Business Plan did not identify funding sources, such as the EMS levy that was
13 later placed on the February 5, 2002 ballot.

14 **FACTS**

15 1. On January 30, 2002, the Public Disclosure Commission received a complaint
16 from Kelly Hinton alleging that officials of the City of Vancouver had used the facilities of the
17 Vancouver Fire Department to support a February 5, 2002 Emergency Medical Services (EMS)
18 levy. The complaint also alleged that city officials had used public facilities to support the levy
19 election by posting promotional material on the city’s web site and by developing a business plan
20 to promote the levy election.
21

22 2. Respondent Don Bivins is the Fire Chief for the Vancouver Fire Department
23 (hereafter VFD).

24 3. Respondent Marilyn Westlake is the Public Education Coordinator for the VFD.
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1 4. The VFD and Clark County Fire District 5 (hereafter District 5) consolidated
2 operations in 1994. District 5 has one administrator, Respondent Marty James, and a board of
3 Fire Commissioners. District 5 has independent taxing authority and contracts with the VFD for
4 its fire suppression and prevention and Emergency Medical Services (EMS). District 5 operates
5 the Northwest Fire Training Center, a regional training center for fire departments.

6 5. As a result of the needs and possible solutions identified by the VFD Business
7 Plan, funding sources were identified by the City Manager and discussed with the Vancouver
8 City Council and the Board of Fire Commissioners for Clark County Fire District 5, in a joint
9 workshop in October, 2001, each of which voted in early November, 2001, to place the EMS
10 levy on the February 5, 2002 ballot.

11 6. The cost of the proposed levy was 50 cents per \$1,000 of assessed valuation for a
12 six year period to generate approximately \$6,250,000 per year for a total of \$37,500,000 over the
13 six year period of the levy.

14 7. On November 5, 2001, the Vancouver City Council voted to place an EMS levy
15 before its voters for additional fire department funding pursuant to RCW 84.52.069, the proceeds
16 from which may be used for emergency medical care or emergency medical services, including
17 related personnel costs, training for such personnel, and related equipment, supplies, vehicles and
18 structures needed for the provision of emergency medical care or emergency medical services.
19 This levy vote was held on February 5, 2002 and failed.

20 8. On November 6, 2001, Clark County Fire District 5 Commissioners voted to
21 place a companion EMS levy on the February 5, 2002 ballot. The levy failed.

22 9. Following the defeat of the February 5, 2002 EMS levies, District 5 ran an EMS
23 levy in September 2002 that was also defeated.

10. The City of Vancouver has not placed another EMS levy before the voters since the February 5, 2002, ballot.

11. Subsequent to the defeat of the EMS levies:

- a. General fund budget cuts in the 2003-2004 City biennial budget, primarily to the Parks and Recreation budget, permitted the City to put into service a light-duty EMS vehicle (Medic 84) in July, 2003.
- b. In the summer of 2003, the VFD finalized plans to begin construction of one new fire station (Station 87), funded jointly by the City and District 5, and groundbreaking for the station was on February 28, 2005.

III. ARGUMENT

A. PRODUCTION AND DISTRIBUTION OF THE *LIFELINE* AND *NEWS@5* NEWSLETTERS WERE PART OF THE NORMAL AND REGULAR CONDUCT OF CITY AND/OR DISTRICT 5 BUSINESS.

Rather than, as alleged, being planned as a group of three newsletters, the *Lifeline* newsletter was planned as an ongoing publication of the City, comparable to District 5's *News@5* newsletter and newsletters of other fire departments.

The *Lifeline* was inspired in part by Portland Fire Department's monthly newsletter, copies of which Chief Bivins gave to Marilyn Westlake. Ms. Westlake met with a Portland Fire Department Information Officer in September, 1999, to gather information about their newsletter. Because of the workload involved in producing a monthly newsletter, Chief Bivins and Ms. Westlake ruled out a monthly format and understood at the outset that even a quarterly schedule would be difficult to meet.

The Summer and Fall 2001 issues of *Lifeline* were published in June 29, 2001 and September 12, 2001 respectively. The City Council and District Boards did hold their meeting to discuss funding options until October of 2001, and did not vote to place the EMS levy on the February, 2002, ballot until the early part of November, 2001.

1 The major focus of the Summer and Fall 2001 *Lifelines* was the Business Planning
2 process, with links to the Plan referenced in the *Lifelines*.

3 The Summer 2001 edition focused on explaining the major “lines of business” of VFD:
4 EMS, fire and rescue, and specialized services. Chief Bivins’ letter introduced the Business
5 Planning process and advised readers that he would report back on its recommendations in the
6 fall. There was nothing in the Summer 2001 edition about any levy or any other funding
7 mechanism.

8 The Fall 2001 edition featured the Business Plan and its key recommendations. While
9 mention was made of planned meetings the following month (October) of the City Council and
10 District Board to discuss funding possibilities (including an EMS levy), it was only that – a
11 mention.

12 After the Council and Board met and voted to place the levy on the February 5, 2002
13 ballot, the Winter 2002 *Lifeline* addressed the specifics of the levy in what Respondents believe
14 was a balanced and objective manner. It recapped twenty year trends in call volume and type,
15 response times and staffing; referenced the Business Planning process; explained what the levy
16 funds would purchase; and listed the levy cost (\$.50/\$1000 assessed valuation) and an example
17 of what a homeowner of a \$150,000 home would pay. The cover page noted that the levy was
18 February 5, 2002, and mail ballots had to be postmarked by that date. It also gave the VFD
19 website and phone numbers, including Chief Bivins’, to contact for more information on the
20 levy. Nowhere did it urge a “yes” vote on the levy.

21 Since the February 5, 2002, EMS levy election, the *Lifeline* and *News@5* newsletters
22 have been issued as follows:

23 September 2002 – *News@5*
24 March, 2003 – *News@5*

1 July 2003 - *Lifeline*
2 March 2005 - *News@5* - “*Fifty at 5*” 50th anniversary edition.

3 The Notice of Administrative Charges notes that Summer 2001 *Lifeline* used large red
4 type and that the Winter 2002 *Lifeline* had some language bolded and in large red type. The
5 *Lifelines* for Summer 2001, Fall 2001, Winter 2002, and Summer 2003 will all be introduced at
6 hearing in their entirety, as will the *News@5* newsletters dating to 1985.

7 It will be apparent that all of the *Lifelines*, before and after the election, feature red, blue,
8 brown and/or black. All feature bolding, italics, and other typesets throughout the text.
9 Likewise, the *News@5* newsletters feature a variety of colors, typesets, photographs,
10 illustrations, etc., that were designed to be attractive and eye-catching.

11 Respondents anticipate bringing to the hearing, and perhaps entering as exhibits, a few
12 examples of other City publications which routinely feature a variety of attractive colors,
13 typesets and photographs.

14 RCW 42.17.130(3) provides that it is not an unlawful “use” of the facilities of a public
15 office or agency to promote or oppose a ballot proposition to engage in “activities which are part
16 of the normal and regular conduct of the office or agency.”

17 WAC 390-05-273 defines “normal and regular conduct of a public office or agency” as
18 “conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary
19 implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by
20 some extraordinary means or manner.” This is subject to the proviso that “No local office or
21 agency may authorize a use of public facilities for the purpose of assisting a candidate's
22 campaign or promoting or opposing a ballot proposition, in the absence of a constitutional,
23 charter, or statutory provision separately authorizing such use.”
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1 Among the basic principles laid out by the Commission's September 26, 2000,
2 *Guidelines for Local Government Agencies, Including School Districts, In Election Campaigns*,
3 is #3, that "the Commission contends that local agencies have a responsibility, and hence, the
4 authority, to communicate with the public about the operation of the agency or jurisdiction."
5 These were the *Guidelines* in place at the time pertinent to this case.

6 As outlined above, the *Lifelines* and *News@5* publications were planned and executed as
7 ongoing publications of the VFD and District 5, respectively. The three editions that immediately
8 preceded the February 5, 2002, EMS levy vote were not planned as a "group" to "promote" the
9 EMS levy.
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11 Without question, all these publications communicated about the operations of VFD
12 and/or District 5. Like many local government publications, they did not contain exclusively
13 "good news" about service levels.

14 The Summer and Fall 2001 *Lifelines* communicated most specifically about the Business
15 Planning process. The Fall 2001 *Lifeline* mentioned a levy as one possible funding mechanism to
16 implement the plan.

17 Had the Council and District Board decided on some other funding mechanism in
18 October 2001 and rejected the levy option, the Summer and Fall 2001 *Lifelines* would not be
19 characterize as promotional.
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21 To now declare, after the outcome of the Council/District deliberations are certain, that a
22 single reference to a possible levy in the Fall 2001 *Lifeline* demonstrates that both the Summer
23 and Fall 2001 *Lifelines* were promotional places Respondents and the City in a "Catch 22."
24 There will be reluctance in the future to ever mention the words "levy" or "vote" in any normal
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1 and regular publication until a measure is placed on the ballot, for fear that the publication could
2 later be deemed “promotional.”

3 **B. THE WINTER 2002 LIFELINE PROVIDED BALANCED AND FAIR**
4 **INFORMATION ON THE EMS LEVY**

5 Once Vancouver City Council and District 5’s Board voted to place the EMS levy on the
6 ballot, the next *Lifeline* (Winter 2002) was planned to provide factual information about the levy
7 and was scheduled for mailing prior to the election. This edition has been described above and
8 will be introduced at the hearing so the Commission can decide for itself whether it is balanced
9 and fair.

10 However, Respondents wish to address three issues not addressed in Winter 2002 *Lifeline*
11 which the Notice of Administrative Charges cite as evidence the *Lifeline* was not balanced and
12 fair:

13 1. Reserve Fund for fire station.

14 One issue raised in the Notice of Administrative Charges is that the *Lifelines* and FAQ
15 did not mention the City had approximately \$2 million in reserve capital funds from District 5
16 that had been targeted to build a fire station. The reasons for this will be addressed later, but by
17 way of background:
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- 19 a. These capital funds had been transferred by District 5 to the City in 1998,
20 pursuant to the 1994 City/Fire District 5 Consolidation Agreement.
- 21 b. They were earmarked by the Agreement for construction of a future fire station in
22 the north section of the Fire District, known as the “Station 87” area.
- 23 c. Although land had been purchased for the Station 87 location, and some site work
24 had been performed, the City did not start construction due to lack of funds to
25 fully fund construction and to staff the station, once constructed.
- d. As of the February 5, 2002, EMS levy ballot, the amount in the reserve fund was
\$1,740,000.

- 1 e. District 5 was not satisfied with the pace of City construction of Station 87 after
2 the EMS levies failed, and in the spring of 2003, the District requested the capital
3 funds be returned to it, minus site acquisition and preparation expenses.
- 4 f. After some negotiation, and in consideration of the transfer of the capital funds to
5 it, District 5 agreed to provide \$700,000 of the returned capital funds, plus
6 accrued interest, toward the construction of Station 87 once a contract for
7 construction had been awarded by the City.
- 8 g. The contract for construction of Station 87 was subsequently awarded and
9 ground-breaking took place February 28, 2005.
- 10 h. Funding for construction for Station 87 comes from the approximately \$700,000
11 provided by the District, \$500,000 in Fire Department capital reserves with the
12 balance to be provided from the City's Real Estate Excise Tax or Fire Fund cash
13 reserves.
- 14 i. Staffing is to be provided by volunteers supervised by paid Captains. Funding for
15 the paid Captains would be provided by additional District contributions. The
16 equipment to be deployed at the station will be an existing volunteer engine.

17 As noted above, the *Lifeline* and FAQ did not mention the \$1.7 Million reserve fund held
18 in escrow by the City as of the date of the levy.

19 However, both the FAQ and *Lifeline* refer readers to the VFD website and the Business
20 Plan, which at p.8 of the Departmental Summary, item 7, notes: "Build Station 87: estimated cost
21 \$1,986,000 (*Funds exist in special account; no new capital*). " (*Emphasis added*).

22 The *Lifeline* and FAQ could have called this information out, but it was still the case that
23 the amount in the capital reserves account was not sufficient to build even one new fire station,
24 let alone equip and staff it; that the Business Plan identified a need for two new stations over a
25 four year period; and that in order to fund the needs identified in the Business Plan, the amount
expected to be generated by the levy would be needed in any case.

1 2. Total amount generated over six year life of the levy.

2 Again, this is information that *could* have been placed in the FAQ or in the Winter 2002
3 *Lifeline*. However, it was not information that was required by any law to be placed there; would
4 have been an estimate only if it were (i.e. the amount collected could vary depending on the real
5 estate market and assessed valuations over the six year life of the levy); and was not among the
6 items of information that seemed at the time to be most of interest to the public. Most voters
7 want to know what the impact is likely to be on their property taxes, so of course, an example of
8 what the levy would mean to a property owner with a \$150,000 home was included.

9 3. Cuts, etc, if the levy failed.

10 This subject was not addressed for two basic reasons.

11 First, the cuts, etc, which might follow a levy failure were not known at the time. Both
12 the Police and Parks and Recreation Department Business Plans were still in process at the time
13 of the EMS levy. The City truly did not know what cuts or other measures would be reasonable
14 should EMS levy fail. Only later in 2002, after the Parks and Recreation Department Business
15 Plan was further along, and the 2003-2004 budget process was underway, were specific cuts
16 identified – and made.

17 Second, harkening back to the “Catch 22” referenced above, listing what cuts might take
18 place could have well been viewed by the public as a “scare tactic” to make voters support the
19 levy.

20 C. **DECEMBER 7, 2001, FAQ PROVIDED BALANCED AND FAIR INFORMATION**
21 **ON THE EMS LEVY**

22 In addition to the Winter 2002 *Lifeline*, VFD utilized an EMS levy FAQ (Frequently Asked
23 Questions) as a handout to patrons at the fire stations beginning December 7, 2001. This two-
24 page Xeroxed FAQ sheet was easily printed on an as-needed basis, answered the commonly
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1 asked questions VFD was receiving about the levy, and was a handy reference for staff to use to
2 answer questions over the telephone from the community, both saving time and ensuring that
3 consistent and correct information was given out. The FAQ and Winter 2002 *Lifelines* were both
4 also posted on the VFD website, as well as the prior Summer and Fall 2001 *Lifelines*.

5 It is Respondent's position that the FAQ also was balanced and fair. It too will be
6 introduced at the hearing for the Commission's review. The reasons for not including certain
7 information in the Winter 2002 Lifeline apply to the FAQ.

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9 **D. FORMATTING AND COLORATION OF NEWSLETTERS WAS CONSISTENT
WITH REGULAR AND NORMAL STYLE OF CITY PRINT PUBLICATIONS.**

10 The Notice of Administrative Charges appears to argue that the fact that the Summer
11 2001 *Lifeline* used large red type (p. 7, paragraph 9) and that the Winter 2002 *Lifeline* had some
12 language bolded and in large red type (p. 7, paragraph 11) shows that the *Lifelines* were
13 promotional in nature.

14 The *Lifelines* for Summer 2001, Fall 2001, Winter 2002, and Summer 2003 will all be
15 introduced at hearing in their entirety. The Commission is asked to note that all of them, before
16 and after the election, feature red, blue, and black. All feature bolding, italics, and other typesets
17 throughout the text.

18 Likewise, the *News@5* newsletters dating back to 1985 will also be introduced at hearing,
19 and feature a variety of colors and typesets throughout the texts.
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1 **E. PRODUCTION/DISTRIBUTION OF THE TWO PAGE FAQ, IN ADDITION TO**
2 **THE WINTER 2002 LIFELINE, DID NOT VIOLATE RCW 42.17.130**

3 The Notice of Charges refers to the Winter 2002 Lifeline as “*the* fact sheet,” in reference
4 it the portion of the September 26, 2000, Commission Guidelines that deal with what information
5 about a ballot measure an agency may provide without being “promotional.”

6 The implication of the Notice of Charges is that by sending the Winter 2001 *Lifeline* out
7 to residents of Vancouver and Fire District 5, as well as having a FAQ handout at the fire
8 stations, the two publications – no matter how balanced and fair they might be individually –
9 become “promotional” because of their number.

10 The Guidelines pose and answer the question:

11 “May a local agency prepare different materials for different audiences?”

12 Answer: A local agency may only prepare *one* fact sheet for distribution in a normal and
13 regular manner. Publishing different information for selected audiences is promotional. If
14 it can be demonstrated that there is confusion about factual information of a ballot
15 measure, a jurisdiction may send clarifying information to the citizens in the same
16 manner as the initial fact sheet.”

17 The Guidelines also say, in a somewhat contrary vein, that:

18 “A local agency may distribute information to all citizens within its jurisdiction. *Each*
19 *agency can determine the best way to distribute information to the public without*
20 *targeting individuals or use of marketing techniques that promote or oppose the ballot*
21 *measure.” (Emphasis added)*

22 These guidelines have been held to be just that – guidelines are purely advisory and have
23 no legal or regulatory effect. WEA v PDC, 150 Wn.2d 612, 622 (2003). If they are applied to
24 enforce a strict “one fact sheet only” rule, then it would appear that they are being enforced as if
25 they did have the force of law.

However, if the Guidelines are indeed “guidelines,” and agencies indeed may determine
the best way to distribute information to the public without violating RCW 42.17.130, it follows

1 that the content of the publications – not the number – should be the primary determining factor
2 in deciding whether they “promote” or “oppose” a given ballot measure.

3 It is the position of Respondents that both the 2002 Winter *Lifeline* and the December 7,
4 2001, FAQ, are fair and balanced. The *Lifeline* is essentially a summary version of the FAQ.
5 They also each served a necessary function.

6 The Lifeline was planned as the generic, basic factual mailing to residents of Vancouver
7 and District 5.

8 However, VFD also received citizen inquiries about a variety of issues involving the
9 levy. Rather than having to reprint the 2002 Winter *Lifeline*, having firefighters or other staff
10 spend time answering questions individually, and risk inconsistent or incorrect information being
11 given out to the public, the two page “FAQ” format fact sheet was developed as a handy tool to
12 provide answers to commonly asked questions. It covered much the same information as the
13 *Lifeline*, but could be duplicated on an as needed basis at less cost than printing or reprinting
14 more of the *Lifelines*.

15 It would seem to raise the Guidelines to the level of regulation or law, to require that the
16 FAQ, which was developed to be a handy, information sheet, also be mailed out to the residents
17 of the City and District. (It was posted in the VFD Web page.)

18 The Respondents submit that developing and using two factual sets of materials for the
19 levy, as opposed to just one, did not violate RCW 42.17.130 and was a sensible and practical
20 way to distribute information to the public
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1 **F. NEWS RELEASES.**

2 VFD issued fifty seven (57) news releases in 2001 and 2002, twenty-eight (28) of which were
3 issued between January 1, 2001 and the levy election February 5, 2002. Of these, the Notice of
4 Administrative Charges focused on these two.

5
6 **G. NEWS RELEASE OF DECEMBER 14, 2001 (“SLICE OF AMERICAN PIE”) DID**
7 **NOT SOLICIT CAMPAIGN CONTRIBUTIONS OR SUPPORT OF LEVY IN**
8 **VIOLATION OF RCW 42.17.130.**

9 December 14, 2001 news release: “A ‘Slice of American Pie’ for Vancouver
10 Firefighters.”

11 This news release highlighted an initiated effort by a senior citizen, Betty Lane, who
12 baked and sold pies to raise money for firefighters in the wake of the 9/11 attacks. The news
13 release about Ms. Lane made no mention of the EMS levy or of fundraising efforts by the levy
14 campaign. It was posted to the VFD website on December 14, 2001. It was not until later,
15 December 20, 2001, that Ms. Lane donated the money she had raised to the “Yes for Fire-EMS”
16 levy committee. Chief Bivins and Ms. Westlake did not cause this press release to be removed
17 because it made no mention of the EMS levy. Ms. Lane also some of the donated some of the
18 funds from her pie-baking effort to New York firefighters and their families. When one actually
19 reads the December 14, 2001, news release, about Betty Lane’s pie-baking fundraiser, it is clear
20 that it does not request anyone to donate to the campaign or to support the levy. A copy will be
21 an exhibit at hearing.
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1 It describes one person's response to the events of 9/11, during which time fire and police
2 departments across the nation, including VFD, were flooded with donations and tokens of
3 support of all kinds.

4 On December 20, 2001, it became apparent that Betty Lane intended her donation to be
5 for something more specific, and that she wanted to contribute some of her pie-baking earnings
6 to the EMS campaign committee.

7 As the December 14, 2001, VFD press release did not mention the levy and campaign at
8 all, it did not occur to Chief Bivins or Ms. Westlake that it might be considered to be a
9 promotional piece for the levy or to think to remove it from the VFD website.

10 Neither, they submit, would the average voter have made the connection between Betty
11 Lane's pie-baking efforts and the levy campaign by reading the December 14, 2001, press
12 release.

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14 **H. NEWS RELEASE ON ELECTION DAY, FEBRUARY 5, 2002 (SUBJECT: 2001**
15 **EMERGENCY CALL STATISTICS) WAS NOT INTENDED, NOR HAD THE**
16 **EFFECT, OF PROMOTING THE EMS LEVY IN VIOLATION OF RCW**
17 **42.17.130**

- 18 2. February 5, 2002, news release: "Rising system demand in 2001 has further
19 slowed fire department response times."

20 The day of the EMS levy election, February 5, 2002, a news release was issued reporting
21 the number of emergency calls in 2001. It included the statement, "*Rising system demand in*
22 *2001 has further slowed fire department response times.*" This was followed by a statement from
23 Chief Bivins, who said "*This is a cause for concern because quick response is critical to meet*
24 *our basic role, which is to safeguard lives and property.*"

1 By way of background, VFD publishes its emergency call statistics on an annual basis.
2 Statistics for 2000-1990 were, for example, reported in the City's 2000 Annual Report. Thus,
3 reporting this information was in the regular and normal course of City business.

4 The data on emergency calls in 2001 was provided to a VFD technician by Clark
5 Regional Emergency Services Agency (CRESA) on about January 10, 2002, but was not relayed
6 to Ms. Westlake until February 5, 2002. She issued the press release in the regular and normal
7 course of her duties at that time.

8 Release of this information on the same day as the EMS levy election was not and could
9 not have been "promotional." Understanding why this is so requires understanding of some basic
10 facts about the media climate in Vancouver/Clark County.

11 The only two local newspapers of general circulation in Vancouver/Clark County are *The*
12 *Columbian* and *The Oregonian*. Both are *morning* newspapers. A news release issued on the day
13 of the election was too late to have been reported in those papers.

14 In terms of television coverage of the statistics, Vancouver/Clark County did not have at
15 the time (and still does not have) any local cable news programs, and the broadcast stations
16 serving Vancouver/Clark County are Portland broadcast stations. These only occasionally cover
17 Vancouver/Clark County public affairs issues, and then, only the issues they deem to be the most
18 dramatic and "newsworthy."

19 As a practical matter, release of VFD emergency response statistics on February 5, 2002,
20 did not, and could not, have had any impact on the EMS levy election held that day. Had
21 Respondents Bivins and Westlake intended the statistics to impact the election, the news release
22 would have had to be issued *at least* a day before the election, and better yet, earlier so the
23 information would be more likely to reach absentee voters.
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1 Given the local media climate in Vancouver/Clark County, release of the 2001
2 emergency call statistic on the same day as the February 5, 2002, EMS levy election was simply
3 not timed to influence the election. Chief Bivins and Ms. Westlake did not intend for the press
4 release to influence the election. Had they so intended, the press release would have been issued
5 before election day.

6 There is no evidence Respondents are aware, or which is contained in the PDC
7 investigative record, that indicates that the February 5, 2002 news release received any coverage
8 in any news outlet in Vancouver/Clark County area on election day.
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10 **I. BIVINS ALLEGATION #8: PROVISION OF INFORMATION ABOUT THE**
11 **EXISTENCE OF A PUBLIC RECORD, AND/OR HOW TO MAKE A PUBLIC**
DISCLOSURE REQUEST FOR IT, DOES NOT VIOLATE RCW 42.17.130.

12 In the spring of 2001, Chief Bivins directed Ms. Westlake to coordinate the development
13 of a VFD Informational Video for use in making presentations to the public about VFD
14 activities. The goal of the video was to inform the public about who the VFD was and what it
15 did, with a theme along the lines of “The Vancouver Fire Department, more than just a fire
16 department.” The intent was to use the video whenever the department was asked to make a
17 presentation to a neighborhood association or service club. Marilyn Westlake was asked to
18 coordinate making the video. It has not been completed to date because of the demands of other
19 projects and different direction from a new supervisor.
20

21 In June 2001, Ms. Westlake contacted Jim Demmon, Manager of the City/County
22 government cable access (CVTV – Channel 49) to produce the video. Ms. Westlake gave Mr.
23 Demmon a copy of a previously prepared VFD Power-Point presentation to assist him in writing
24 the script. Mr. Demmon then assigned the project to a CVTV video producer, who proceeded to
25 shoot video footage. Mr. Demmon created a “rough cut” of the video and gave it to Ms.

1 Westlake on September 10, 2001. The video has not been completed due to other workload, but
2 its footage has been used in other City projects

3 In December, 2001, the “Yes for Fire-EMS” had been formed to support passage of the
4 February 5, 2002 EMS levy. The Committee hired Jeff Williams, a media consultant, to work
5 with them on promoting the levy.

6 Early in January, 2002, Mr. Williams contacted CVTV and made a public records
7 disclosure request for EMS footage. He did not request the particular footage shot earlier in the
8 summer.

9 Mr. Demmon provided EMS video footage to Mr. Williams that had been prepared for
10 the VFD informational video, including “B roll footage” typically used with voice-overs in video
11 production.

12 CVTV staff routinely makes copies of the specific footage requested by members of the
13 public. At the time Mr. Williams made the request, Mr. Demmon was aware that the EMS
14 footage shot earlier in 2001 for the VFD informational video was on CVTV’s edit system and
15 already loaded into the computer, making it the most convenient EMS video for CVTV staff to
16 provide to Mr. Williams. After Mr. Williams reviewed the existing footage, he requested and
17 received specific footage he wanted based on his needs.

18 Mr. Williams then created a TV commercial using the video footage obtained via the
19 public record request. The footage included images of VFD equipment and personnel engaged
20 in a variety of staged VFD related activities.

21 Although Chief Bivins and Ms. Westlake knew of the footage, and may have mentioned
22 its existence to Mr. Williams, he has worked in the Portland/Vancouver media market for many
23 years, is familiar with CVTV, and with making public record requests. Mr. Williams has made
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1 public record requests for CVTV footage in the past, and intended to make CVTV the first place
2 he was going to look for material for the campaign advertisement even if he had not talked with
3 Chief Bivins and Marilyn Westlake.¹

4 WAC 390-20-271(1) provides that “RCW 42.17.130 does not restrict the right of any
5 individual to express his or her own personal views concerning, supporting, or opposing any
6 candidate or ballot proposition, if such expression does not involve a use of the facilities of a
7 public office or agency.”

8
9 Respondents Bivins and Westlake dispute that either of them told Jeff Williams, the
10 campaign’s media consultant, about any particular video footage at CVTV or that they instructed
11 him how to make a public disclosure request. Jeff Williams had in the past obtained CVTV
12 footage under a public disclosure request, was well aware of how to make such a request, and
13 confirmed in his interview with the Commission staff that he would have contacted CVTV for
14 footage for the campaign whether he had spoken to Chief Bivins and Ms. Westlake or not.

15 However, assuming for the purposes of this pre-hearing brief that the Commission finds
16 that the Respondents did inform Jeff Williams of EMS footage at CVTV and/or told him how to
17 make a public disclosure request, such speech does not constitute “use of a public facility” within
18 the meaning of RCW 47.17.130.
19

20
21 ¹ Question (Suemary Trobaugh) “And you did that (i.e. go to CVTV) because of Don Bivens’ (sic) suggestion that
she (Westlake) would know if there was anything out there?”

22 Answer (Jeff Williams): “Actually I did it because that (CVTV) was the first place I was going to look anyway.”
PDC Interview Jeff Williams, November 15, 2004, p. 8 of 12.

23 Question (Phillip Stutzman): “And was CVTV a place that you were going to go to on your own even if you had not
24 talked to Chief Bivins or Marilyn Westlake?”

25 Answer (Jeff Williams): “Oh yeah. Yeah. I wanted to see, I didn’t know what anybody else knew and I thought I’d
see what they had available as far as footage. I assumed at the time that it was public domain and I could use it and I
wouldn’t have to pay for it. You give them a cassette and they fill it up and then that (is) it...” (PDC Interview, Jeff
Williams, November 15, 2004, pp. 8-9 of 12

1 In brief, it is not at all clear that information or knowledge is not a “facility” or that
2 communicating information or knowledge is “use” of a facility.

3 RCW 42.17.130 provides that “Facilities of public office or agency include, but are not
4 limited to, use of stationery, postage, machines, and equipment, use of employees of the office or
5 agency during working hours, vehicles, office space, publications of the office or agency, and
6 clientele lists of persons served by the office or agency.”

7
8 Shortly after adoption of Initiative 276, the Commission clarified the meaning “facilities”
9 in WAC 390-04-040:

10 "Whereas sec. 13 of the Act forbids certain political uses of the office facilities of
11 elected public officials but expressly denies the application of that section to
12 activities which are a part of the normal and regular conduct of an office; it shall be
13 the policy of the Commission to construe the term 'use of any facilities' in sec. 13 of
14 the Act as meaning only (1) uses of 'facilities', as that term is therein defined, *which*
15 *constitute or result in a measurable expenditure of public funds; or (2) such uses*
16 *which have a measurable dollar value.*

17
18 "Examples of activities or uses which the commission considers to be excluded from
19 sec. 13 of the act are verbal endorsements or statements favoring or opposing
20 candidates or ballot issues which endorsements or statements *do not directly or*
21 *indirectly involve any measurable expenditures of public funds.*" (Emphasis added.)
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23
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1 This WAC has since been repealed²; but the examples of “facilities” in the statute have not
2 been amended and all involve use of a tangible item of property.

3 And, even if information were a “facility,” providing information off duty, away from the
4 workplace is a minimal use of such facility, or not a use at all. See 1979 AGO No. 3; 1975 AGO
5 No. 23; 1973 AGO No. 26, and in particular 1975 AGO 23, footnote 4.

6 In contrast to the statutory examples of uses of tangible items of property, Chief Bivins
7 and Marilyn Westlake are alleged to have provided information to Jeff Williams, the campaign
8 media consultant, about certain video footage during off-duty time at a non-work location. There
9 is no allegation that they gave him video footage, just information about it. There is no allegation
10 that CVTV staff violated RCW 42.17.130 by providing Williams with video footage.

11 To transform the mere relaying of knowledge or information about a public record into a
12 violation of RCW 42.17.130, the Notice of Charges allege that Don Bivins, Marilyn Westlake
13 and the CVTV employees (who have not been charged with providing the tape to Mr. Williams)
14 were “uniquely” aware of the EMS footage shot in the summer of 2001, and thus, the footage
15 was not made available on a “nondiscriminatory, equal access basis for political uses.” WAC
16 390-05-271(2).
17

18 The reality is that awareness of the existence of the footage was not “unique.” Besides
19 Bivins and Westlake, and the CVTV staff, all of the firefighter/EMT’s and other City staff who
20 participated in shooting the footage were aware of there was such footage. So would any co-
21

22
23 ² The current WAC 390-05-273 provides that “Normal and regular conduct of a public office or
24 agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1)
25 lawful, i.e., specifically authorized, either expressly or by necessary implication, in an
appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary
means or manner. No local office or agency may authorize a use of public facilities for the

1 workers or family or friends they told about the video shoot. When one considers all the people
2 involved in the video shoot, or who may have talked about it, the list of persons with “unique”
3 knowledge could be quite lengthy.

4 To carry the reasoning in the Notice of Charges to its logical conclusion, would one of
5 these other individuals have been in violation of RCW 42.17.130 if they relayed their “unique”
6 knowledge to Jeff Williams?

7 And, if the CVTV footage in question were instead of a City elected official making
8 intemperate remarks during an otherwise unpublicized event, would it be a violation for an
9 employee who learned of the videotaping to deliberately relay this knowledge, outside work
10 hours or the workplace, to the official’s political opponents for purposes of gathering material for
11 a political “attack ad?”
12

13 Respondents submit that RCW 42.17.130’s ban on use of public facilities to promote or
14 oppose a ballot measure does not extend to relaying information to a third party. And, as
15 discussed in the next section, such an interpretation would chill the free speech rights of public
16 employees and put public employers at risk for attempting to discipline public employees for
17 exercising such rights.

18 **J. APPLYING RCW 42.17.130 TO PROHIBIT PUBLIC EMPLOYEES FROM**
19 **PROVIDING THIRD PARTIES WITH INFORMATION ABOUT THE EXISTENCE OF**
20 **OTHERWISE DISCLOSABLE PUBLIC RECORD VIOLATES THEIR FIRST**
21 **AMENDMENT RIGHTS AND RIGHTS UNDER RCW 41.06.250.**

22 RCW 41.06.250(2) provides that:

23 Employees of the state or any political subdivision thereof shall have the right to
24 vote and to express their opinions on all political subjects and candidates and to
hold any political party office or participate in the management of a partisan,

25 purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the
absence of a constitutional, charter, or statutory provision separately authorizing such use.”

1 political campaign. Nothing in this section shall prohibit an employee of the state
2 or any political subdivision thereof from participating fully in campaigns relating
3 to constitutional amendments, referendums, initiatives, and issues of a similar
4 character, and for nonpartisan offices.

5 The second sentence of this section has been read to affirm the right of city employees to
6 participate in nonpartisan campaigns as well as partisan campaigns, and arguably, in local ballot
7 measure campaigns as well. *Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wn.2d 748,
8 752-753 (1984).³

9 The Commission's current and prior guidelines have recognized that public employees do
10 not forfeit their rights to engage in political activity because of their employment. See PDC
11 Interpretation 04-02, Guidelines for Local Government Agencies in Election Campaigns, p. 3;
12 PDC Interpretation 00-05 (Superseded by 04-02), p. 3.

13 Public employee rights to engage in political activity are based upon the First and
14 Fourteenth Amendments as a form of free expression and association, are generally balanced
15 against the government's interest in loyalty and efficiency, and are generally scrutinized under a
16 strict standard. (See *McQuillin Mun Corp* §12.244 (3rd Ed.).

17 The courts have recognized the right of public employees to speak on matters of public
18 concern. See *City of San Diego v. Roe*, 125 S. Ct. 521, 523 (2004), citing *Pickering v. Board of*
19 *Education*, 391 U.S. 563 (1968).

20 But even when a public employee's off-duty is totally unrelated to their job (e.g. a
21 government microbiologist writing reviews of dance performances), that speech may be

22
23 ³ The court in this case declined to award attorney fees against the City because the challenge to
24 the ordinance that had banned employee participation in nonpartisan city elections had been
25 based on state law. Had it been based on the First Amendment, attorney fees may have been
awarded. reasonable attorneys' fee

1 protected by the First Amendment. *United States v. National Treasury Employees Union*, 513
2 U.S. 454, 461 (1995)(Declaring unconstitutional a ban on certain classes of federal employees
3 receiving honoraria).

4 In the recent *City of San Diego v. Roe* cited above, where the employee's off-duty
5 expression was held not to be on a matter of public concern, the employer was still required to
6 show that the expression was detrimental to the mission and functions of the employer in order to
7 terminate the employee. There, a law enforcement officer, in violation of departmental policies,
8 marketed a video showing himself stripping off a police uniform and masturbating on the adults-
9 only section of eBay, and the courts ultimately had no difficulty agreeing that this was
10 detrimental to the mission and functions of his employer.

12 Here, the off-duty expression alleged is that public employees gave a third party factual
13 information about a public record and/or how to make a lawful public record request for it and
14 did so in the process of exercising their right to participate in a local ballot measure.

15 The Respondents submit that it is not reasonable to read RCW 42.17.130 so as to prohibit
16 such speech, and if that is the interpretation, then the statute as applied is in conflict with both
17 their rights under RCW 41.06.250(2) and the First Amendment.

18 **K. BIVINS ALLEGATION #3 – USED CITY VEHICLES/TIME TO SOLICIT**
19 **CAMPAIGN CONTRIBUTION.**

20 This allegation is based on a phone call placed by Chief Bivins to Phil Stutzman on April
21 28, 2004. The paraphrasing of the phone call is contained in Mr. Stutzman's memo of April 29,
22 2004 at bates stamped 00567 and 00568. The paraphrasing is an inaccurate representation of the
23 occurrence.

1 The Respondent Bivins believes the evidence will show that there were at least two
2 meetings with representatives of AMR. In the first luncheon meeting, the evidence will show
3 that the Chief's presence was requested by the local AMR Operations Manager with an
4 undisclosed agenda. At that meeting, the Manger asked the Chief to use his influence to change
5 the type of vehicle that was stated by campaign material as the type of vehicle that was going to
6 be purchased if the EMS levy passed. This meeting called by the Manager was not designed to
7 influence the campaign but to influence the type of vehicle that a Fire Chief might recommend
8 when, as and if the funds are available to purchase the vehicles. This meeting would be an
9 activity, which is part of the normal and regular conduct of the Chief's office under RCW
10 42.17.130(3) and WAC 390-05-273. The local AMR Manager did say that AMR desired to
11 support the levy but could not unless the vehicle type was changed so as to avoid transporting
12 injured persons which could conflict with AMR. The Chief responded at this meeting that levy
13 support by AMR would be left up to AMR.

14 Then there was a subsequent meeting which was one in a series of several meetings
15 between AMR representatives and Vancouver Fire Department representatives. The purpose of
16 this series of meetings was to create an interaction between the two agencies who respond
17 mutually to emergency situations. At the beginning of the meeting, and to clear the air, the Chief
18 announced that he and other members of his staff had discussed changing the type of vehicle and
19 that they had decided that they would not. At that point, the Regional Vice President of AMR
20 indicated that AMR would still want to support the levy. He asked the Chief how much the
21 campaign wanted. The Chief responded by saying that was an AMR decision. He could not ask
22 for money. AMR staff pressed the point, which resulted in the Chief spontaneously saying, by
23 his recollection, "something with a lot of zeros." This should not be considered a "solicitation of
24 funds." It was simply a spontaneous reaction to pressing inquiry, which got a laugh from all
25 those present. It was a joke !! Once again, it would appear that Guideline No. 7 in the

1 Guidelines of September 26, 2000 and Guideline No. 6 in the Guidelines of September 28, 2004
2 from the Public Disclosure Commission would apply. There was certainly no intent on the part
3 of Chief Bivins to “solicit” funds at either meeting with AMR representatives. In fact, it was
4 foisted upon him by those representatives at what otherwise be a regular and normal conduct of
5 his office’s Chief. He clearly indicated it would remain the choice of AMR and then in a jocular
6 manner tried to make light of the situation. The incident was so immaterial that the Regional
7 Vice President didn’t even remember the “lot of zeros” comment and never felt solicited by
8 Bivins.

9 There is no definition of the terms “solicit” in RCW 42.17.020. If such definitions do not
10 exist within the statutes, the courts resort to the “ordinary meaning.” King County Council vs.
11 Public Disclosure Commission 93 WA 2nd 559, 611 P 2nd 1227. In reviewing the American
12 Heritage Dictionary of the English Language published by Houghton Mifflin Company, 1969
13 (and again in 1981) the following definition for the term “solicit” is found.

- 14 “1. To seek to obtain by persuasion, entreaty, or formal application:
15 solicited votes.
16 2. To petition (a person) persistently; entreats; importune.
17 3. To entice or insight (a person) to action, particularly to an immoral
18 or illegal action.
19 4. To approach or cause (a person) with an offer of sexual services.”

20 It would be difficult, if not impossible, to characterize the activity of Chief Bivins with
21 the AMR representatives as one of solicitation. He tried desperately to leave it alone and, in the
22 end, AMR made its own decision. It was not until several weeks later that AMR sent a check for
23 \$2,500.00 dollars to the levy campaign committee. At no time did Chief Bivins ask for money or
24 state a specific amount. He did not persuade, entreat, apply for, and petition persistently for any
25 funds from AMR.

1 **L. BIVINS ALLEGATION #4 – USED CITY VEHICLE TO STORE LEVY**
2 **MATERIALS/HAND OUT TO VOLUNTEERS.**

3 It is inappropriate to use the trunk of the Fire Chief's car to store campaign materials
4 from which it is handed out to volunteers to distribute. This falls in the category of "de
5 minimis." A fine based upon the historical analysis of the PDC would be in the range of \$100.00
6 to \$250.00 dollars.

7 **M. BIVINS ALLEGATION #5 & #6 – USED CITY TELEPHONE TO DISCUSS**
8 **CAMPAIGN MATTERS AND USED CITY COMPUTER TO SEND CAMPAIGN**
9 **RELATED EMAILS.**

10 Citizens and non-city employee campaign workers who call or e-mail a city employee are
11 completely unaware of the position in to which that places the employee. Is the Fire Chief not to
12 accept phone calls? It is impossible to not accept e-mails! The good news is that the Chief
13 transferred the e-mails to his home computer and dealt with those e-mails on off duty hours and
14 through his own computer.

15 The phone calls in to the Chief are equally difficult. Businessmen who are serving on a
16 campaign committee traditionally use their business hours (9 to 5) to conduct business. It would
17 not occur to them that they could not call the Chief for information.

18 RCW 42.17.130(3) specifically excludes from the prohibition on use of public facilities:

19 "Activities which are part of the normal and regular conduct of the office
20 or agency."

21 It is submitted that the use of the telephone and e-mail have become activities which are
22 part of the normal and regular conduct of the office. There is no evidence that Chief Bivins used
23 the e-mail or the telephone during office hours or using city facilities to campaign for or solicit
24 help for the campaign. At worst he may have had a few isolated phone calls or e-mail exchanges
25 with the co-chairs of the levy campaign.

1 The above-mentioned “basic principles” are also applicable to this aspect of Chief Bivins
2 allegations. How could he possibly have “wrong intent” if the e-mails come to him? Likewise,
3 how can he avoid taking a phone call from a businessman or citizen of the community who also
4 serves as co-chair of the levy campaign?

5 **N. BIVINS ALLEGATION #7 - AUTHORIZED FIRE CAPTAIN TO STORE**
6 **CAMPAIGN MATERIALS IN OFFICE.**

7 The allegation here is that Chief Bivins did not assert himself as Chief to prohibit the Fire
8 Captain from using the Captains’ office to store campaign materials. By implication, there was
9 an “authorization” to use said public facility. The context of the phone call is that the Fire
10 Captain called the Chief on his pager while the Chief was in Olympia, Washington. Initially the
11 Chief believed this to be a page from a Fire Captain done in a normal and regular conduct of his
12 office or agency and the Chief returned the call. The evidence will show that the phone call
13 turned into a request by an aggressive Fire Captain as to what to do with certain campaign
14 materials that he had in his possession. The Fire Chief initially told him that it could not be
15 stored at a public facility or city facility. Being apparently unable to use his own judgment the
16 Fire Captain persisted until the Chief said, “Just do what you have to do.” By implication, the
17 Chief let himself get worn down so that the Fire Captain could then excuse himself for using
18 public facilities to store the campaign materials.

19 Again, this would seem to approach the “de minimis” conduct. The conduct was not
20 initiated by the Chief and truly was not condoned by the Chief. It is simply something that
21 happened while trying to alleviate the stress of being out of town, at a activity which is part of
22 the normal and regular conduct of the office and which the Chief thought he was conducting
23 appropriately. This is an isolated incident not to be connected with any of the other incidents. It
24 cannot even be used to show a “pattern” of conduct by the Chief. He, the Chief, was trying to do
25 the right thing by telling the Captain it should not be left in a city facility and yet the Captain

refused to take on his own initiative to take it somewhere else until the Chief just had to get off

1 the phone and told him to do what he had to do. There was no intent on the Part of Chief Bivins
2 to violate the Public Disclosure Code by storing the Captains' material in the Captains' office.

3 **O. WESTLAKE ALLEGATION #1 (FIRST THREE "BULLET POINTS" PP. 15-16**
4 **PLACED PROMOTIONAL MATERIALS**

5 The Notice of Administrative Charges alleges that certain VFD webpage material was
6 promotional.

7 One of Marilyn Westlake's duties as Public Education Coordinator for the VFD was to
8 prepare and post content for the VFD website.

9 She now recognizes that in her desire to create a website that would hold the interest of
10 readers, she did in fact use language that could reasonably be read as promoting its passage (e.g.
11 "galloping growth" as opposed to a census figures or call volume statistics) and repeated
12 references to the EMS levy on some of the webpages.

13 **P. WESTLAKE ALLEGATION #1 – P. 16 LIFELINES, TWO NEWS RELEASES**
14 **AND "FACT SHEET."**

15 The portions of this Brief which address the allegations against Don Bivins in regard to
16 allegations that the Lifelines, news releases and "Fact Sheet" are also intended to address those
17 allegations regarding Ms. Westlake placing those publications on the VFD website.

18 **Q. WESTLAKE ALLEGATION #2 – USE OF CITY COMPUTER FOR CAMPAIGN**
19 **BROCHURE.**

20 Ms. Westlake - Use of Computer. It is clear from the testimony of Marilyn Westlake
21 that she used her personal time and her personal computer to "create" the subject brochure. She
22 did this at home on her own time. It was only when she needed to put the brochure in "final
23 form" that she mistakenly chose to use the City's computer because it had a publication software
24 that she did not have available anywhere else. In trying to avoid impropriety, she worked at the
25 computer on her lunch hour with no assistance from anyone else.

1 The Public Disclosure Commission has issued “guidelines” interpreting RCW 42.17.130
2 on two occasions. The first set of such guidelines was issued September 26, 2000. “Basic
3 Principles” No. 7 discusses the consideration and analysis of activities which may or may not be
4 determined to be in violation of the statute. It point out:

5 “The PDC has, over the years, developed methods of considering and
6 analyzing engaged in by local government offices and agencies. Among
7 the factors considered are the normal conduct of the office or agency and
8 the timing of activities as compared with Ballot Measure Elections. As
9 in any manner where intent is to be considered, hard and fast rules which
10 will be applicable to all situations are difficult to establish.”

11 The emphasis here is that the issue of “intent” does not lend itself to hard and fast rules
12 but that the PDC will take on an analysis of the activities.

13 The second occasion is the guidelines dated September 28, 2004, which, technically, do
14 not relate back to 2001 but do suggest how the commission may look at the matter under current
15 events since the RCW itself has not changed. Among other things, the “Basic Principles” No. 6
16 reads in part as follows:

17 “The PDC has, over the years, developed methods of considering and
18 analyzing activities engaged in by public offices. Among the factors
19 considered are the normal and regular conduct and the timing, tone, and
20 tenor of activities in relation to Ballot Measure Elections. As in any
21 matter where intent is to be considered, hard and fast rules, which will be
22 applicable to all situations, are difficult to establish.”

23 This “guideline” clearly mirrors Ms. Westlake’s use of her office computer. She had no
24 intent to influence the outcome of the election by using the software on the Vancouver City
25

1 computer. She was simply using what was available to her as a convenience. It did not occur to
2 her that when she did it in isolation that it would be a violation of the Public Disclosure Rules.

3 While the use of the city's computer and software itself is inappropriate, the penalty for
4 that use should rank among what is characterized as "de minimis." Washington state courts have
5 held that RCW 42.17.130 is implicated when agencies make a "significant campaign effort" on
6 behalf of a candidate or ballot issues. King County Council vs. PDC 93 WA 2nd 559, 566, 611
7 P 2nd 1227 (1980). A discussion of use of public facilities for partisan campaign purposes
8 including the use of stamps was discussed in the city of Seattle vs. State of Washington 100 WA
9 2nd 232, 668 P 2nd 232, 668 P 2nd 1266 (1983).

10 The actual interpretation of the word "use" of public facilities is not defined by RCW
11 42.17.130. It has been addressed by the Attorney General in various opinions. See 1979 AGO
12 No. 3; 1975 AGO No. 23; 1973 AGO No. 26. The opinion there was that the statute "does not
13 apply to de minimis uses; e.g., the minimal use of office time and space while responding
14 verbally to an inquiry; an incidental remark made in the course of an official communication,
15 etc." 1975 AGO 23, footnote 4.

16 This AG opinion quoted a since-repealed regulation of the PDC which measured the use
17 of facilities in terms of a "measurable expenditure of public funds; or (2) such uses which have a
18 measurable dollar value."

19 Accordingly, a penalty for Ms. Westlake's use of the city computer for one hour over her
20 lunch break should be a modest amount to ensure simply that she will not repeat that process. A
21 recent public school employee was reprimanded and fined \$50.00 for putting solicitation letters
22 in teachers' mailboxes at a public school.

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IV. CONCLUSION

Based on the foregoing, Respondents Don Bivins and Marilyn Westlake respectfully request that the Commission dismiss the charges against them for violations of RCW 42.17.130 based on the following conduct or alleged conduct:

- 1.) Publication and placement on the VFD website of three *Lifeline* newsletters for Summer 2001, Fall 2001 and Winter 2002;
- 2.) Publication and placement on the VFD website of the December 7, 2001 Frequently Asked Questions (FAQ);
- 3.) Publication and retention on the VFD website of the December 14, 2001 ("Slice of American Pie") press release;
- 4.) Publication and placement on the VFD website of the February 5, 2002 (2001 VFD response statistics) press release;
- 5.) Alleged improper communication regarding existence of VFD video footage to campaign consultant.

They further respectfully request that the Commission find that the use of a City computer by Ms. Westlake and the use of the truck of his VFD and use of emails and telephone by Chief Bivins be deemed de minimis and that fines, if any, be assessed accordingly.

Respectfully submitted this 18th day of March, 2005.

Judith Zeider, WSBA #07804
Chief Assistant City Attorney
Of Attorneys for Respondent
City of Vancouver

Brian H. Wolfe, #4306
Brian H. Wolfe
Of Attorneys for Respondents
Don Bivins and Marilyn Westlake

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing CITY OF VANCOUVER'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION TO MODIFY RULING on:

Ruthann Bryant
Confidential Secretary
Public Disclosure Commission
711 Capitol Way, Rm 206
Olympia, WA 98503-0908
rbryant@pdc.wa.gov

With a copy to:

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By the following indicated method:

☐ by **mailing**, via US Mail and electronic email, full, true and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington on the date set forth below.

The undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Vancouver, Washington this _____ day of March, 2005.

Judith M. Zeider, WSBA No. 07804
Chief Assistant City Attorney
City of Vancouver, Washington

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